IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JOSEPH LOMBARDO, KAREN STOUT, and TRI-COUNTY DISPOSAL & RECYCLING, Plaintiffs,	:	CIVIL ACTION
v.	:	NO: 00-3340
EASTERN WASTE OF PHILADELPHIA, INC., LOUIS PAOLINO, JR., EASTERN ENVIRONMENTAL SERVICES, INC., WASTE MANAGEMENT, INC., and WASTE MANAGEMENT HOLDINGS, INC., Defendants.	:	

GREEN, S.J. **SEPTEMBER _____, 2002**

MEMORANDUM/ORDER

Presently before the Court are Defendant Waste Management Holdings, Inc.'s Motion for Summary Judgment, Plaintiffs' Answer, and Defendant's Reply. For the following reasons, Defendant's motion will be granted.

I. Factual and Procedural Background

Plaintiffs were "engaged in the business of waste management collection, recycling and disposal." In May of 1996, Plaintiffs agreed to sell all of their assets and properties in Tri-County Disposal & Recycling ("Tri-County") to Eastern Waste of Philadelphia, Inc. ("Eastern Waste"). As part of the Purchase and Sale of Assets Agreement ("Agreement"), Plaintiffs were given up-front consideration of $1.2 million. In addition to the up-front consideration, Plaintiffs were promised additional consideration if certain events occurred. Plaintiffs allege that all of the prescribed events did transpire, and that, as a result, they are due significant consideration from Eastern Waste, which, to date, Eastern Waste has not forwarded. Plaintiffs argue that Eastern

Waste's failure to remunerate the Plaintiffs in accordance with the Agreement must be viewed as a breach of contract, for which Plaintiffs are entitled damages.

In August, 1996, Eastern Waste entered into a sale of assets agreement with Eastern Environmental Services, Incorporated ("EESI"), in which Eastern Waste purported to transfer the assets which Eastern Waste had obtained from Plaintiffs. The contract did not contain any express provision that EESI assumed Eastern Waste's liabilities to Plaintiffs. Later, in December 1998, EESI completed a merger with Waste Management, Inc., forming Waste Management Holdings, Inc. ("WM Holdings").

In the most recent iteration of their allegations, Plaintiffs set forth causes of action against Eastern Waste, Louis Paolino, Jr., EESI, Waste Management, Inc., and Waste Management Holdings, Inc. By separate stipulations, the Plaintiffs agreed to dismiss their claims against Louis Paolino, Jr., Waste Management, Inc., and EESI. Furthermore, it has been agreed that Defendant WM Holdings will be legally liable for any damages assessed against Waste Management, Inc. or EESI. Therefore, the only remaining Defendants are WM Holdings and Eastern Waste. To date, however, Eastern Waste has neither answered Plaintiffs' Amended Complaint, nor, apparently, has it been served in this matter.[1] Notably, Plaintiffs have not moved to default Eastern Waste.

Plaintiffs filed the instant action in the Philadelphia Court of Common Pleas. The

[1] Eastern Waste has not entered an appearance in this matter. In its memorandum in support of its motion for summary judgment, WM Holdings stated the following: "Defendant Eastern Waste has not been served. Plaintiffs purported to serve Eastern Waste at a Waste Management of New Jersey facility. Eastern Waste is not related to Waste Management of New Jersey or any Waste Management entity, and this service could not have been proper." (See **Dfdt.'s Mem.** at 6 n.24.) Plaintiffs did not contest this statement in their Response.

Defendants removed the case on June 30, 2000, invoking the diversity jurisdiction of this Court pursuant to 28 U.S.C. § 1332. In their Second Amended Complaint filed April 20, 2001, Plaintiffs alleged that the Defendants were liable for breach of contract.

In the instant motion, Defendant WM Holdings argues that it is entitled to summary judgment because Plaintiffs have failed to produce any evidence that WM Holdings is related in any way to Eastern Waste. Therefore, WM Holdings argues, since there is no evidence that they are related to Eastern Waste, all claims against WM Holdings must be dismissed. Plaintiffs filed a response to Defendant's motion, and, on September 9, 2002, the Court heard oral argument on Defendant's motion for summary judgment from the parties.

II. Standard of Review

WM Holdings moves pursuant to Rule 56 of the Federal Rules of Civil Procedure. To be successful, WM Holdings must prove that, in considering the "pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, . . . there is no genuine issue as to any material fact and that the [Defendant is] entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c). An issue is "material" if the dispute may affect the outcome of the suit under the governing law and is "genuine" if a reasonable jury could return a verdict for the nonmoving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary judgment should be granted, "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). If, in response to a properly supported motion for summary judgment, an adverse party merely rests upon the allegations or

denials in their pleading, and fails to set forth specific, properly supported facts, summary judgment may be entered against her. See Fed. R. Civ. P. 56(e). Of course, a court must draw all reasonable inferences in favor of the party against whom judgment is sought. See American Flint Glass Workers, AFL-CIO v. Beaumont Glass Company, 62 F.3d 574, 578 (3d Cir. 1995). The substantive law controlling the case will determine those facts that are material for the purpose of summary judgment. See Anderson, 477 U.S. at 248.

"As a basic premise, federal courts sitting in diversity are required to apply the substantive law of the state whose laws govern the action." Robertson v. Allied Signal, Inc., 914 F.2d 360, 378 (3d Cir. 1990). "When ascertaining matters of state law, the decisions of the state's highest court constitute the authoritative source." Connecticut Mutual Life Insurance Co. v. Wyman, 718 F.2d 63, 65 (3d Cir. 1983).

The instant matter is before the Court due to the diversity of the parties, and the Court will apply Pennsylvania law.[2]

III. Discussion

In its motion for summary judgment, WM Holdings concedes that it has assumed the responsibilities of EESI. (See **Dfdt.'s Mem.** n.30.) However, as stated above, WM Holdings

[2] Neither party specifically argues that Pennsylvania law does or does not apply. However, Plaintiffs "reside" in Pennsylvania, and the parties rely on Pennsylvania law in their briefs. (See **Dfdt.'s Mem.** at 10-11; **Pltfs.' Resp.** at 4-6.) Also, the parties to the contract which Plaintiffs allege has been breached agreed that the contract was to be "governed by and construed in accordance with the Commonwealth of Pennsylvania." (See **Dfdt.'s Mem.** Exh. 1, § 13.6.) Generally, in resolving a claim brought under the Court's diversity jurisdiction, the law to be applied is the law of the forum state. See Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); see also Gasperini v. Center for Humanities, Inc., 518 U.S. 415, 417 (1996) (holding that, under Erie doctrine, "federal courts sitting in diversity apply state substantive law and federal procedural law"). Since neither party disputes the application of Pennsylvania law, I will, where applicable, apply Pennsylvania law to examine the matter sub judice.

disputes whether EESI is responsible in any way towards Plaintiffs. In order for EESI, and, ultimately, WM Holdings, to be responsible towards Plaintiffs, Plaintiffs must show that EESI is responsible, in some fashion, for the promises which Eastern Waste made to Plaintiffs when Eastern Waste purchased Plaintiffs' company.

Before considering the merits of the motion for summary judgment, I will address an issue raised by Plaintiffs' counsel during oral arguments.

A. Plaintiffs' request to file affidavits out-of-time.

Pressed at oral argument, Plaintiffs' counsel averred that there was evidence to support Plaintiffs' allegations that Defendant WM Holdings was liable to Plaintiffs. In answer to the Court's inquiry into why Plaintiffs had not provided any of this evidence in their response to the motion for summary judgment, Plaintiffs' counsel made an oral motion for leave to file an affidavit in support of their previously filed response. For the following reasons, Plaintiff's oral motion will be denied.

Though Plaintiffs' counsel did not provide any legal authority for his request to file affidavits out-of-time, the Court will consider Plaintiffs' motion. Federal Rule of Civil Procedure 6(b)(2) provides that when an act is required "to be done at or within a specified time, the court for cause shown may at any time in its discretion . . . upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect."

Defendant WM Holdings filed its motion for summary judgment in March, 2002, and Plaintiffs responded in April, 2002. Plaintiffs could have filed any affidavits they wanted the Court to consider at the time they filed their response, but they failed to do so. Upon receiving

Plaintiffs' response to its motion for summary judgment, Defendant filed a Reply Brief, in April, 2002, in which it argued that its motion for summary judgment should be granted because Plaintiffs' response to its motion was not supported by affidavits, evidence or "specific facts to contradict the evidence supporting WM Holdings' motion for summary judgment." (See **Dfdt.'s Reply** at 1.) Defendant's Reply Brief should have spurred Plaintiffs to supply the Court with the necessary evidentiary support. Plaintiffs, however, failed to do so, and decided to rely on the arguments they had put forth in their response instead of fashioning a new response which was supported by the evidence.

Later, Plaintiffs were procedurally given another chance to file affidavits, by operation of this Court's order setting a date for oral argument. Rule 56(c) provides that an "adverse party prior to the day of the hearing may serve opposing affidavits." A liberal reading of this provision would have permitted Plaintiffs to have filed any affidavits up to the day before the oral arguments were held. Again, however, Plaintiffs failed to file any affidavits or produce any evidence to support their case. Finally, at the oral arguments, Plaintiffs did not submit any evidence or affidavit to support their argument that there remains a genuine issue of material fact.

Reviewing Plaintiffs' response memorandum, it is clear that Plaintiffs' counsel was aware of the requirements of Rule 56. (See **Pltfs.' Resp.** at 3-4.) Particular proof of this awareness is evident from the following, correct recitation of the law:

> A motion for summary judgment is properly granted **if and only** if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Gans v. Mundy, 762 F.2d 338 (3d Cir. 1985).

(See **Pltfs.' Resp.** at 3.) (emphasis in original) Even with this clear understanding of the

evidentiary requirements of Rule 56, Plaintiffs failed to provide supporting evidence from any deposition, answer to interrogatory, or admission, and Plaintiffs further failed to submit any affidavits.

Later, when pressed during oral argument to supply support for their allegations, Plaintiffs asked for additional time to obtain and submit affidavits. However, after considering Plaintiffs' request, I conclude that Plaintiffs knew the standard that was to be applied to their case, independently and correctly stated that standard in their response, then failed to comply with it. Therefore, I conclude that Plaintiffs' failure to submit evidence contesting Defendant's motion for summary judgment is not the result of excusable neglect, and Plaintiffs' request to submit affidavits is denied.

B. Defendant's motion for summary judgment.

Under Pennsylvania law, liability is not generally imposed on a successor company, except where:

> (1) the purchaser expressly or impliedly agrees to assume the obligation;
> (2) the transaction amounts to a consolidation or *de facto* merger;
> (3) the purchasing corporation is merely a continuation of the selling corporation;
> (4) the transaction was fraudulently entered into to escape liability.

See, e.g., Philadelphia Elec. Co. v. Hercules Inc., 762 F.2d 303, 308 (3rd Cir. 1985) (citations omitted). It is undisputed that EESI did not expressly agree to assume Eastern Waste's obligations to Plaintiffs. The other exceptions require a factual inquiry into specific, post-agreement events. Therefore, in order to rebut the presumption that liability is not imposed on a successor company, a plaintiff must come forward with specific evidence showing the existence of one of the aforementioned exceptions. In the instant matter, Plaintiffs have failed to sustain

their burden, as they have failed to come forward with any evidence whatsoever.

In their response to Defendant's motion for summary judgment, Plaintiffs use the bulk of their memorandum arguing that WM Holdings is responsible for EESI's obligations, a point which WM Holdings explicitly admitted in its memorandum supporting its motion for summary judgment. Also in their Response, Plaintiffs state the following:

> In paragraph 5 of the Second Amended Complaint, plaintiffs have *alleged and intend to prove* that defendant [EESI] is liable to plaintiffs as the successor corporation to defendant Eastern [Waste], having purchased both its assets and its liabilities.

(See **Pltfs.' Resp.** 1.) (emphasis added). This allegation is not supported by the contract between EESI and Eastern Waste, which expressly shows that EESI has purchased certain assets from Eastern Waste, but has not expressly accepted any liabilities. At this stage in the proceedings, it is insufficient to simply rest on previously made allegations. Though Plaintiffs "intend to prove" that EESI is liable to Plaintiffs, this "intent" must, at this stage of the litigation, be supported by specific evidence.

In their response to Defendant's motion for summary judgment, Plaintiffs have failed to come forward with any evidence to support any of their allegations. Plaintiffs have failed to show that there is a genuine issue of material fact regarding WM Holdings relationship to Eastern Waste. Since Plaintiffs have not submitted any evidence that WM Holdings is either related to Eastern Waste or responsible for any obligations Eastern Waste has towards Plaintiffs, I conclude, as a matter of law, that a fact-finder could not find WM Holdings liable to Plaintiffs. Therefore, Defendant WM Holdings's motion for summary judgment will be granted.

IV. Conclusion

I conclude that adequate time has been given to discovery. See Celotex, 477 U.S. at 322.

I further conclude that Defendant WM Holdings has filed a properly supported motion for summary judgment and that Plaintiffs, merely resting upon the allegations in their pleading, have failed to set forth specific, properly supported facts to contest Defendant's motion. Therefore, Defendant's motion for summary judgment will be granted. An appropriate order follows.

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ORDER

AND NOW, this _____ day of September, 2002, upon consideration of Defendant Waste Management Holdings, Inc.'s Motion for Summary Judgment, Plaintiffs' Answer, and Defendant's Reply, and after hearing oral argument from the parties, **IT IS HEREBY ORDERED** that Defendant Waste Management Holdings, Inc.'s motion is **GRANTED**, and Judgment will be entered for Defendant Waste Management Holdings, Inc. and against Plaintiffs.[1]

BY THE COURT:

_____
CLIFFORD SCOTT GREEN, S.J.

[1] The Court, in its Judgment, has found, pursuant to Federal Rule of Civil Procedure 54(b), that there is no reason to delay entry of judgment for Waste Management Holdings, Inc., because there is no evidence that one of the potential parties has in fact been served.

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JUDGMENT

AND NOW, this _____ day of September, 2002, the Court finds, pursuant to Federal Rule of Civil Procedure 54(b), that there is no just reason to delay an entry of judgment for Defendant Waste Management Holdings and against Plaintiffs, and, **ACCORDINGLY, IT IS HEREBY ORDERED** that**FINAL JUDGMENT** is expressly directed for Defendant Waste Management Holdings, Inc. and against Plaintiffs.

BY THE COURT:

_____
CLIFFORD SCOTT GREEN, S.J.